

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-1180063 LICENSE NO. 389992
Issued to: AUSTIN R. BRITTON, JR.

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2013

AUSTIN R. BRITTON, JR.

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1, now 5.30-1.

By order dated 13 November 1973, an Administrative Law Judge of the United States Coast Guard at Port Arthur, Texas suspended Appellant's license for three months outright upon finding him guilty of negligence. The specification found proved alleges that while serving as Second Mate on board the United States SS GULFSEAL under authority of the license above captioned, on or about 2 July 1973, Appellant did, not at approximately 1320, permit two barrels of lube oil to overflow No. 5 port cargo tank and enter the Taylor's Bayou Turning Basin.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence testimony of two live witnesses.

In defense, Appellant offered in evidence his own testimony.

At the end of the hearing, the Judge rendered a decision in which he concluded that the charge and specification had been proved. He then served a written order on Appellant suspending his license for a period of three months outright.

The entire decision and order was served on 13 November 1973. Appeal was timely filed and a brief was submitted in support of appeal on 31 July 1974.

FINDINGS OF FACT

On 2 July 1973, the SS GULFSEAL was moored at the Gulf Docks, Taylor's Bayou Turning Basin, Port Arthur, Texas, onloading a cargo of mixed petroleum products. At approximately 1155 Appellant, the Second Mate, relieved the watch and became the senior deck officer

on duty. The remainder of the watch consisted of three unlicensed men, including the Quartermaster, Robert C. Bearfield. At the time the watch was relieved seven tanks were being loaded.

At approximately 1300 two tanks on the foredeck topped off nearly simultaneously. Appellant personally supervised the topping off of one tank while Quartermaster Bearfield was assigned to top off the other tank. Bearfield was experienced in loading procedures with approximately twenty years involvement in petroleum loading, including seven years aboard the SS GULFSEAL. He had been standing watches with the Appellant for approximately one year. There is no evidence that Bearfield had ever had any difficulty performing loading operations.

After both foredeck tanks were topped off, Appellant made a round of the remaining tanks that were loading, assigned Bearfield to watch the midship tanks that were still loading 5 port, 5 center, and 4 starboard, assigned the other members of his watch to take in mooring lines, and went to the midships house to log the topping off of the foredeck tanks. While in the midships house Appellant conversed with the Chief Mate and a day worker concerning stowage of cargo booms forward. Meanwhile, on deck, Bearfield was requested by the Dockman to check with the Mate concerning starting to load another tank with asphalt. Bearfield left the deck and went to the midships house to check with the Appellant. At approximately 1320 Bearfield returned on deck and saw No. 5 port tank overflowing. Although he immediately had the Dockman shut down the valve, approximately two barrels of lube oil escaped over the side and entered Taylor's Bayou Turning Basin. Appellant also left the midships house and supervised containment procedures on board the SS GULFSEAL. At all relevant times Appellant was acting under the authority of his license.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that:

(1) The Administrative Law Judge abused his discretion in allowing the government to amend the specification after the government had rested its case and before the defendant produced any evidence.

(2) The findings of the Administrative Law Judge are based on alleged admissions by Appellant in violation of his right against self incrimination.

(3) The Administrative Law Judge abused his discretion by assisting the investigating officer in examination of witnesses and assuming the role of an advocate for the government.

(4) The Administrative Law Judge's conclusions do not conform with the substantial evidence rule in finding that Appellant negligently permitted two barrels of oil to spill.

APPEARANCE: For appellant: W. C. Radford, Esq.

OPINION

I

As a preliminary matter Appellant has made a formal motion objecting to the official transcript of proceedings and requests that an independent reporting service be allowed "to review the transcriptions of this hearing and record the same as the official transcript." While some minor stenographic errors do occur in the verbatim transcript, Appellant has not specified any error that would prejudice him or adversely affect the proceedings. The certification by the court Reporter and the Administrative Law Judge's acceptance of the transcript is considered sufficient to overcome the objections of Appellant

II

Appellant's complaint that the Administrative Law Judge allowed the government to amend the specification after resting its case is without merit. The original specification alleged that Appellant permitted oil to enter the Sabine-Neches Canal. At the conclusion of the government's case Appellant's attorney pointed out that the body of was that the SS GULFSEAL was moored in and into which the oil was discharged was Taylor's Bayou Turning Basin, which is adjacent and connected to the Sabine-Neches Canal. The Administrative Law Judge amended the specification by substituting Taylor's Bayou Turning Basin for the Sabine-Neches Canal. Appellant does not specify any particular prejudice resulting from this amendment. The purpose of a specification is to provide notice to the charged party so that he had an adequate opportunity to prepare his defense. Ordinarily, amendment of a specification to reflect a more precise location is not a matter of substance. The record in this case is devoid of anything requiring any different treatment for this amendment.

III

Appellant's contention that the findings of the Administrative Law Judge are based on admissions made by Appellant in violation of his right against self incrimination is equally without merit. The record is clear that the Administrative Law Judge refused to admit into evidence any statement made by Appellant during the course to

the investigation of the oil spill. At page 9 of the transcript, in response to an objection by Appellant's counsel, the Administrative Law Judge ruled that

the regulations clearly state that any admission that a person may have made during the course of an investigation to an Investigating Officer that that officer cannot testify as to what he told him.

Furthermore, Appellant's reliance in his brief on Miranda v. Arizona, 384 U.S. 436 (1966) misconstrues the nature of these proceedings. The Miranda rule has no application to a remedial administrative proceedings held under R.S. 4450. Appeal Decision 1847 (SPERLING), affirmed by Bender v. Sperling, 1 N.T.S.B. 2317.

IV

Appellant next contends that the Administrative Law Judge abused his discretion in assisting in the examination of witnesses. 46 CFR 5.20-1(a) requires that the Administrative Law Judge conduct the hearing in a manner so as to bring out all relevant facts and insure a fair and impartial hearing. Although the Judge interrogated all witnesses on salient and material points relevant to the issues in controversy, there is no showing that he was biased or partisan. Appellant's statement that this questioning "developed testimony which was highly prejudicial to Appellant" emphasizes the effectiveness of the Judge's interrogation rather than points to any particular bias or prejudice.

It is the function of an examiner, just as it is the recognized function of a trial judge, to see that the facts are clearly and fully developed. He is not required to sit idly by and permit a confused or meaningless record to be made. Bethlehem Steel Co. v. N.L.R.B., 120 F. 2d 641 (C.A.D.C. (1941)).

The Judge's participation in the development of the record in this case is not grounds for error.

V

Appellant's remaining contention is that the Administrative Law Judge's conclusion of negligence does not conform with the substantial evidence rule. Since I find, as detailed below, that the specification under the charge of negligence is fatally defective I do not reach Appellant's exact contention. The specification alleges that "while serving as Second Mate aboard SS GULFSEAL, under authority of the captioned documents, did on 2 July 1973, at approximately 1320 permit two barrels of lube oil to

overflow out of No. 5 port cargo tank and enter the Taylor's Bayou Turning Basin." Negligence is defined in 46 CFR 5.05-20(a)(2) as

the commission of an act which a reasonably prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonably prudent person of the same station, under the same circumstances, would not fail to perform.

This specification fails to allege any negligent act or omission. "A specification should be so framed that if all its allegations are found established the offense charged must be found proved. "Appeal Decision 1739 (CARNES). Here, proof of the act alleged, permitting oil to overflow and enter the water, does not in and of itself establish negligence. The same proof could establish an innocent act or wilful conduct. More must be alleged. In this case the manner in which he permitted oil to overflow and enter the water should have been specified, such as failing to properly supervise the loading, leaving a tank that was close to topping off unattended, or whatever act or omission the investigating officer will rely on to show negligence.

A deficiency in pleading could be corrected at this time if the issues involved were actually litigated and there had been actual notice and an opportunity to cure surprise. Kuhn v. Civil Aeronautics Board, 183 F. 2d 839 (C.A.D.C. (1950)). However, in this case, the failure to allege a negligent act or omission was not cured. Appellant was never put on notice as to what conduct was considered to be negligent. The failure to specify negligent conduct is highlighted in the opinion of the Administrative Law Judge. After summarizing the testimony, the Judge discusses only the effect of a union agreement concerning the duties of the Quartermaster. The concluding sentence of this discussion states:

Although the Union Agreement is to the effect that a quartermaster should assist in loading and discharging of a vessel, this provision does not in any way relieve the officer in charge of overall responsibilities.

Without further discussion he finds the charge and specification proved. No where is there any comment concerning how Appellant negligently carried out his responsibilities. The Opinion then concludes by reciting 46 CFR 35.35-35 "DUTIES OF SENIOR DECK OFFICER DURING TRANSFER OPERATIONS - TB/ALL," again without discussion. If the implication is that Appellant did not comply with the regulation, then Misconduct should have been the charge. However, even if that were the case, there is no showing of how Appellant failed to carry out his duties. After reading this record, I feel that the act of spilling oil was treated as

negligence per se, without requiring pleading or proof of any particular negligence on the part of Appellant.

CONCLUSION

My review of the transcript and the Administrative Law Judge's Opinion convinces me that the ultimate issue of Appellant's negligent act or Omission was never fully litigated during the proceedings below. Therefore, it would be inappropriate to amend the defective specification at this time. Furthermore, due to the intervening time period, I find that it would not serve the purposes of these remedial administrative proceedings to remand the case.

ORDER

The order of the Administrative Law Judge dated at Port Arthur, Texas, on 13 November 1973, is VACATED and the charge is DISMISSED.

O. W. Siler
Admiral, U.S. Coast Guard
Commandant

Signed at Washington, D.C., this 13th day of December 1974.

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